

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHENIER HOLLOWAY,

Defendant-Appellant.

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UNPUBLISHED

June 9, 2009

No. 280834

Wayne Circuit Court

LC No. 06-011352-01

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of 19-30 years' imprisonment for the second-degree murder conviction and 3-5 years' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. Because defendant was not denied a fair trial, because defendant was not denied the effective assistance of counsel, and because directed verdict was properly denied, we affirm.

On appeal, defendant first contends that he was denied a fair trial by virtue of the admission of evidence regarding his silence in the face of accusations that he committed the crime(s) at issue. Because defendant did not object to the evidence or otherwise preserve this issue for review, we review his constitutional claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). An effect on substantial rights generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. *Id.*

Defendant asserts that the trial court erred in allowing Tiyest Harrell to testify that after the murder, Timothy Bonds and defendant appeared at her home and, when Bonds advised that defendant had committed the murder, defendant remained silent. While admission of the evidence may have been improper, defendant is not entitled to relief as defendant was not prejudiced by the admission of the evidence.

In *People v Bigge*, 288 Mich 417; 285 NW 5 (1939), the prosecutor, in his opening statement to the jury, stated that one of defendant's relatives told a mutual friend that defendant was guilty of embezzlement, and that defendant, who was present during the discussion, had a duty to deny the statements if they were not true. Our Supreme Court, finding that the admission of the statement constituted reversible error, stated, "[t]he time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court." In light of *Bigge*, it could reasonably be argued that admission of the evidence concerning defendant's silence, when accused of murder, was improper. Defendant, however, would likely have been convicted regardless of the testimony in question.

First, Harrell's testimony could have been viewed as untrustworthy. She gave a false name when she provided her first statement to police that Timothy Bonds had implicated defendant as the shooter. In a later statement, however, she said that Bonds stated his cousin Dwight shot the victim. Although Harrell explained that her first statement was in fact accurate and that she only changed her statement to go along with what she believed the police wanted to hear, the fact that she gave a false name and provided two contradictory statements to police may have undermined her credibility at trial. As an additional challenge to Harrell's credibility, Bonds testified that he did not go to Harrell's home on the night of the shooting and that he never told Harrell that defendant shot the deceased, Carvelle Marshall.

Second, and perhaps more importantly, Harrell testified that defendant was wearing a beanie on the night in question. Walter Rogers, David Hendrick and Marcus Jackson were at the PPH Lounge with Carvelle Marshall on the night of the shooting. Each witness testified at trial that a man with a beanie was near Carvelle Marshall at the time of the shooting. Hendrick further testified that the man with the beanie was the shooter. Finally, Marcus Jackson not only testified that a man with a beanie was involved in the shooting, but identified defendant as the shooter in a 2006 photo lineup.

While certainly there was contradictory testimony presented at the trial and not all of the witnesses were able to identify defendant in a photo lineup, if we exclude the testimony concerning defendant's silence, there was still sufficient evidence of his involvement in the murder. While the dissent refers to the evidence against defendant as "ambivalent", the jury was free to believe or disbelieve the contradicting testimony and, absent exceptional circumstances, issues of witness credibility are for the jury's determination. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Given the existence of sufficient evidence (other than that at issue) identifying defendant as being involved in the murder, defendant has failed to demonstrate that admission of Harrell's testimony seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence, and ultimately prejudiced him.

Defendant also asserts that Harrell's testimony was inadmissible hearsay. On the first day of trial, defense counsel acknowledged that Harrell's testimony regarding Bonds implicating defendant in the murder would constitute hearsay. Defense counsel indicated, as a matter of trial strategy, he would not be objecting to the testimony. Counsel indicated that he had spoken with defendant on the issue and stated for the record, "we do not object to the admission of such testimony. . . ." Where a defendant affirmatively approves of the presentation of a piece of

evidence, he waives any objection to the evidence and extinguishes any resulting error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Thus, this Court will not consider defendant's argument on appeal.

Defendant next argues that he was denied a fair trial due to two instances of prosecutorial misconduct. Where, as here, this issue was not properly preserved, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant. *People v Carines, supra*.

Defendant first contends that the prosecution engaged in misconduct when, in closing argument, it mischaracterized his brother, George Holloway's, testimony. Defendant specifically argues that George Holloway testified that defendant told him Timothy Bonds was *involved* in the shooting; not that Timothy Bonds was the actual shooter. The record establishes that no such mischaracterization occurred. In his closing argument, the prosecutor stated:

And also, what did the defendant say in his statement? He said that Timothy [Bonds] told him that Dwight [Bonds' cousin] shot the guy. Well, what did the defendant's brother testify to? The defendant's brother testified to the fact that the defendant told him that Timothy said that Tim shot the guy, so you can see that there's inconsistent statements. . .

Contrary to defendant's assertion, George Holloway clearly testified that defendant told him that he had heard that Timothy Bonds shot the victim;

Q: Okay. Who did [defendant] tell you he heard had done the shooting at the PPH lounge?

A: He had told me that he heard that Tim [Bonds] had something to do with it.

Q: Okay. Didn't he specifically tell you that he heard that Tim had done the shooting?

A: Yes.

The only inconsistency between the testimony and the closing argument is that George Holloway testified that defendant told him he had *heard* that Timothy Bonds shot the victim, while the prosecutor stated that defendant told Holloway that Timothy had *told* him that he [Tim] shot the victim. Both the testimony and the closing statement serve as evidence that Timothy Bonds was the shooter and, as such, this minor inconsistency had no bearing on the ultimate issue in the case. Even if this were to be considered a mischaracterization, the trial court instructed the jurors that the statements of the attorneys were not to be considered as evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant also asserts that the prosecution denied him a fair trial by eliciting the above-discussed testimony of Tiyest Harrell. Once again, defense counsel (with the acquiescence of defendant) agreed to the admission of this testimony, and the evidence did not prejudice

defendant. Accordingly, defendant cannot establish that his substantial rights were affected and he is not entitled to relief.

Defendant next asserts the trial court erred in denying his motion for directed verdict. We disagree. This Court reviews a trial court's ruling on a motion for directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the elements of the charged offense were established beyond a reasonable doubt. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001).

In order to secure a conviction for second-degree murder, the prosecution must establish that there was "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In the present case, defendant challenges the second prong, indicating that he was improperly identified as the shooter. There were factual inconsistencies between the various witnesses' testimony, to be sure, however, as described elsewhere in this opinion, there was sufficient admissible evidence implicating defendant as the shooter. Marcus Jackson specifically identified defendant as the shooter and several other witnesses bolstered his testimony. A reasonable finder of fact could thus have concluded that defendant was the shooter. The trial court properly denied defendant's motion for directed verdict and permitted the jury to reach a verdict. Defendant is not entitled to relief.

Defendant next contends that he was deprived of the effective assistance of counsel, for a variety of reasons. Because defendant failed to preserve this issue by way of a motion for a new trial or *Ginther* hearing<sup>1</sup>, our review of his claim of ineffective assistance of counsel is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*, pp 484-485.

The applicable test for defendant's ineffective assistance of counsel claim was established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.*, p 303. Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.*

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant primarily alleges that counsel was ineffective for allowing Harrell to testify regarding Timothy Bonds' statements and defendant's silence in the face of those statements. Counsel clearly explained that he was permitting the hearsay testimony for strategic purposes and that he had made the decision after conferring with defendant. By admitting the testimony, counsel was able to later impeach Harrell with her subsequent inconsistent statements to Sergeant Drew. Counsel's decision exhibits a reasonable strategy and his performance was not deficient in this regard. Moreover, defendant's conviction was not the result of Harrell's testimony. Rather, the conviction was secured after Marcus Jackson positively identified defendant and other witnesses corroborated portions of his testimony. Defendant is not entitled to relief where counsel's decision did not affect the outcome of the trial.

Next, defendant contends that counsel was ineffective when he failed to provide a factual basis for his motion for directed verdict. The trial court was present throughout the proceedings and there is no indication that the she was unfamiliar with the facts of the case. A recitation of the facts would have been redundant and unpersuasive. Furthermore, as addressed above, the grant of a directed verdict would have been improper. Because defendant was not entitled to directed verdict, counsel was not deficient for failing to reiterate facts in support of a meritless motion.

Next, defendant asserts that counsel was ineffective for failing to object when the prosecution mischaracterized his brother's testimony. As previously indicated, however, there was no material mischaracterization. Because the prosecution did not materially misrepresent the evidence during its closing argument, defendant cannot establish that his counsel was ineffective for raising an objection without merit.

Defendant also makes a passing comment that counsel was ineffective for failing to call any witnesses and for not calling defendant to testify. It is well established that decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v. Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Finally, defendant asserts counsel was ineffective for failing to move for a new trial after the trial court stated at sentencing that it was "left wanting personally for the quality of evidence." While the trial court did note that it found the evidence to be lacking, it also indicated that it would follow the jury's conclusion, implicitly acknowledging that the court's personal feelings would not serve to usurp the role of the jury. Furthermore, the trial court earlier denied defendant's motion for a directed verdict, indicating that it believed a reasonable finder of fact could find defendant guilty of the charged offenses. Thus, there is no reason to believe that the trial court would have granted a motion for new trial or that such a motion would have increased defendant's likelihood of success on appeal. Once again, defendant cannot establish that counsel's performance was deficient or prejudicial.

Affirmed.

/s/ Henry William Saad  
/s/ Deborah A. Servitto